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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 DEBRA SALZMAN, Derivatively on Behalf )  
of Nominal Defendant, )

12 )  
13 Plaintiff, )

14 vs. )

15 CAROL A. BARTZ, JERRY YANG, ROY )  
BOSTOCK, PATTI S. HART, SUSAN M. )  
16 JAMES, VYOMESH JOSHI, DAVID )  
KENNY, ARTHUR H. KERN, BRAD D. )  
SMITH, and GARY L. WILSON, )

17 Defendants, )

18 – and – )

19 YAHOO! INC., a Delaware corporation, )

20 Nominal Defendant.  
21

No. CV11-03269-CRB

OPPOSITION OF PLAINTIFF YAHIA  
TAWILA TO PLAINTIFF IRON WORKERS  
MID-SOUTH PENSION FUND'S  
AMENDED NOTICE OF MOTION AND  
MOTION TO CONSOLIDATE RELATED  
ACTIONS AND APPOINT LEAD  
COUNSEL

DATE: August 26, 2011

TIME: 10:00 a.m.

CTRM: Hon. Judge Charles R. Breyer

Action Filed: July 1, 2011

22 [Caption continued on next page.]  
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JANE OH, Derivatively on Behalf of Herself  
and All Others Similarly Situated,

Plaintiff,

vs.

CAROL A. BARTZ, JERRY YANG, ROY  
BOSTOCK, PATTI HART, SUSAN JAMES,  
VYOMESH JOSHI, DAVID KENNY,  
ARTHUR KERN, BRAD SMITH, and GARY  
WILSON,

Defendants,

– and –

YAHOO! INC.,

Nominal Defendant.

Case No. CV11-03286-CRB

Action Filed: July 5, 2011

YAHIA TAWILA, Derivatively on Behalf of  
YAHOO! INC.,

Plaintiff,

vs.

CAROL A. BARTZ, JERRY YANG, ROY  
BOSTOCK, PATTI HART, SUE JAMES,  
VYOMESH JOSHI, DAVID KENNY,  
ARTHUR KERN, BRAD SMITH, and GARY  
WILSON,

Defendants,

– and –

YAHOO! INC.,

Nominal Party.

Case No. CV11-03301-CRB

Action Filed: July 6, 2011

1 IRON WORKERS MID-SOUTH PENSION )  
2 FUND, Derivatively on Behalf of YAHOO! )  
3 INC., )

4 Plaintiff, )

5 vs. )

6 CAROL BARTZ, JERRY YANG, ROY J. )  
7 BOSTOCK, PATTI S. HART, SUSAN M. )  
8 JAMES, VYOMESH JOSHI, ARTHUR H. )  
9 KERN, BRAD D. SMITH, GARY L. )  
10 WILSON and JACK MA, )

11 Defendants, )

12 – and – )

13 YAHOO! INC., a Delaware corporation )

14 Nominal Defendant. )  
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Case No. CV11-03302-CRB

Action Filed: July 6, 2011

## TABLE OF CONTENTS

		Page
1		
2		
3	I. SUMMARY OF ARGUMENT AND INTRODUCTION .....	1
4	II. STATEMENT OF FACTS .....	4
5	III. ARGUMENT .....	7
6	A. THE RELATED ACTIONS SHOULD BE CONSOLIDATED .....	7
7	B. THE COURT SHOULD APPOINT TAWILA AS LEAD PLAINTIFF	
8	AND THE WEISER FIRM AS LEAD COUNSEL .....	8
9	1. The Quality of the Pleadings Submitted By the Weiser Firm	
10	Demonstrates That the Weiser Firm Is Best Suited to Represent the	
11	Interests of the Derivative Plaintiffs .....	8
12	2. Tawila Has the Greatest Economic Stake in the Litigation Which	
13	Provides Him With Strong Motivation to Vigorously Prosecute the	
14	Actions .....	10
15	3. Plaintiff Tawila Has Prosecuted the Actions with Greater Energy,	
16	Enthusiasm, and Vigor .....	12
17	4. The Weiser Firm Has a Documented History of Successful	
18	Prosecution of Complex Derivative Actions and Has the Resources	
19	Necessary to Aggressively and Judiciously Prosecute the Actions .....	13
20	IV. CONCLUSION .....	13
21		
22		
23		
24		
25		
26		
27		
28		

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Berkowitz v. Fodor</i> , No. C 06-05353 JW, 2006 WL 3365587 (N.D. Cal. Nov. 20, 2006) .....	11
<i>Bernhard v. TD Bank, N.A.</i> , Civ. No. 08-4392 (RBK/AMD), 2009 WL 3233541 (D.N.J. Oct. 5, 2009) .....	8
<i>Brown v. Kelly</i> , No. C 06-04671 JW, 2006 WL 3411868 (N.D. Cal. Nov. 27, 2006) .....	11
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949) .....	11
<i>Davis v. Comed, Inc.</i> , 619 F.2d 588 (6th Cir. 1980) .....	11
<i>Harbor Finance Partners v. Huizenga</i> , 751 A.2d 879 (Del. Ch. 1999) .....	9
<i>Hirt v. U.S. Timberlands Service Co.</i> , No. CIV. A. 19575, 2002 WL 1558342 (Del. Ch. July 9, 2002) .....	13
<i>Huene v. United States</i> , 743 F.2d 703 (9th Cir. 1984) .....	7
<i>In re New Valley Corp. Derivative Litig.</i> , No. Civ. A. 17649, 2001 WL 50212 (Del. Ch. Jan. 11, 2001) .....	9
<i>In re OCA, Inc. Sec. &amp; Derivative Litig.</i> , No. 05-2165, slip op. (E.D. La. Nov. 18, 2005) .....	3, 8, 10
<i>In re Sonus Networks, Inc.</i> , 499 F.3d 47 (1st Cir. 2007) .....	11
<i>Indiana State District Council of Laborers and Hod Carriers Pension Fund v. Gecht</i> , No. C-06-7274 EMC, 2007 WL 902554 (N.D. Cal. Mar. 22, 2007) .....	7
<i>Kamen v. Kemper Fin. Servs. Inc.</i> , 500 U.S. 90 (1991) .....	9
<i>Millman ex rel Friedman's Inc. v. Brinkley</i> , No. 1:03-CV-3831-WSD, 2004 WL 2284505 (N.D. Ga. Oct. 1, 2004) .....	8
<i>Sparano v. Lief</i> , No. 10cv2079 BTM (BLM), 2011 WL 830109 (S.D. Cal. Mar. 3, 2011) .....	11, 12

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**Page**

<i>TCW Tech. Ltd. P'ship v. Intermedia Comm's, Inc.</i> , No. 18336, 2000 WL 1654504 (Del. Ch. Oct. 17, 2000).....	<i>passim</i>
<i>Wiehl v. Eon Labs</i> , No. Civ. A. 1116-N, 2005 WL 696764 (Del. Ch. Mar. 22, 2005).....	3
<b>STATUTES, RULES AND REGULATIONS</b>	
15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).....	2, 10
Federal Rules of Civil Procedure Rule 42(a).....	7

Plaintiff Yahia Tawila (“Tawila”) hereby opposes the Amended Notice of Motion and Motion to Consolidate Related Actions and Appoint Lead Counsel and Memorandum in Support Thereof (the “Iron Workers’ Motion”) filed by Plaintiff Iron Workers Mid-South Pension Fund (“Iron Workers”). As the dockets in the above-captioned shareholder derivative actions (the “Actions”) reflect, on July 11, 2011, Tawila was the first plaintiff<sup>1</sup> to file a motion to consolidate the Actions and seek his appointment as Lead Plaintiff and the appointment of his counsel, The Weiser Law Firm, P.C. (the “Weiser Firm”) as Lead Counsel in the Actions (referred to hereinafter as the “Tawila Motion”). Accordingly, for purposes of clarification, Tawila does not oppose the Iron Workers’ Motion to the extent that it seeks consolidation of the Actions, but does oppose that portion of the Iron Workers’ Motion that seeks to appoint Iron Workers’ counsel, Robbins Umeda LLP (“Robbins Umeda”) and Johnson & Weaver LLP (“Johnson Weaver”) as Lead Counsel (collectively, “Iron Workers’ Counsel”), and any request by Iron Workers to serve as Lead Plaintiff.

# **I. SUMMARY OF ARGUMENT AND INTRODUCTION**

Generally, each of the Actions alleges that Yahoo has been damaged by the breaches of fiduciary duty and other wrongful conduct of the Board of Directors of Yahoo (the “Board”) and certain of its senior officers (collectively referred to as the “Individual Defendants”).<sup>2</sup> The Actions allege that during the Relevant Period (April 2011 to the present), the Individual Defendants caused Yahoo to issue a series of materially false and misleading statements regarding the Company’s

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<sup>1</sup> The Tawila Motion originally included Plaintiff Jane Oh (“Oh”) and her counsel, the law firm of Glancy Binkow & Goldberg LLP (the “Glancy Firm”). Oh and the Glancy Firm have withdrawn their request to be appointed (via the Tawila Motion) as a Lead Plaintiff and Co-Lead Counsel, respectively, in the Actions. Tawila notes that on August 5, 2011, Plaintiff Debra Salzman (“Salzman”) filed a Motion for Appointment of Lead Plaintiff, and for Appointment of Lead Counsel (the “Salzman Motion”), which is noticed for hearing on September 9, 2011. Given the late receipt of the Salzman Motion and the fact that oppositions to the Salzman Motion are not currently due, Tawila will address the Salzman Motion in accordance with the timeframe set forth in the Local Rules of this Court. Salzman’s counsel was served with the Tawila Motion (both as originally filed on July 11, 2011, and as re-noticed on July 22, 2011).

<sup>2</sup> There are differences as to the named defendants in the Actions (including one such discrepancy discussed further below), and some variation of the derivative claims asserted on behalf of Yahoo in each of the Actions. These differences will be resolved upon the filing of a consolidated complaint.



business and financial results. *See e.g.*, ¶¶2-9 & 41.<sup>3</sup> Specifically, the Individual Defendants failed to timely disclose that an important corporate asset in China known as Alipay (an e-commerce payment system) had been transferred for a mere \$46 million, astronomically less than its estimated value of \$5 billion. ¶¶33-46.

Consolidation of the Actions is appropriate because the Actions involve common questions of law and fact, and considerations of judicial economy strongly favor the simultaneous resolution of the Actions in one forum. Additionally, the Court should appoint Tawila as Lead Plaintiff because he has the greatest financial interest among the moving plaintiffs in the Actions. Indeed, Tawila's holdings of Yahoo stock, in the amount of 220,000 shares, dwarfs the holdings of Yahoo stock by Iron Workers, a mere 2,585 shares.<sup>4</sup>

Iron Workers' and the Iron Workers' Counsels' argument rests on the faulty proposition that because Iron Workers is an institutional investor, it has a greater financial stake in the Actions (and thus, presumably, is well-motivated to vigorously prosecute the Actions), and that it is more "sophisticated" than Tawila. The authority on which the Iron Workers rely for this argument is the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). The underpinning of the PSLRA rationale however, is the assumption that institutional investors, *due to their large financial interests as compared to individual investors*, are best-suited to serve as lead plaintiffs because they are the most economically motivated to vigorously prosecute an action under the federal securities

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<sup>3</sup> Unless otherwise noted, paragraph references ("¶" or "¶¶") are to the Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment filed July 6, 2011 by Plaintiff Tawila derivatively on behalf of Yahoo (Case No. CV11 03301-CRB (the "Tawila Complaint"). The Tawila Complaint is attached as Exhibit A to the Declaration of Kathleen A. Herkenhoff in Support of Motion to Consolidate Related Actions, Appoint Lead Plaintiffs and Appoint Co-Lead Counsel (the Herkenhoff Decl.). The complaints filed in the other Actions listed above are also attached to the Herkenhoff Decl. at Exhibits B-D.

<sup>4</sup> *See* Declaration of Kathleen A. Herkenhoff in Support of Opposition of Plaintiffs Yahia Tawila and Jane Oh to Plaintiff Iron Workers Mid-South Pension Fund's Amended Notice of Motion and Motion to Consolidated Related Actions and Appoint Lead Counsel ("Herkenhoff Aug. 5 Decl.") at Ex. A (Declaration of Tawila); Declaration of Harvey Swift in Support of Motion to Consolidate Related Actions and Appoint Lead Counsel, submitted with the Iron Workers' Motion ("Swift Decl.") at ¶3.



1 laws. Indeed, the PSLRA creates a presumption that the “most adequate plaintiff” is the movant  
2 with the “largest financial interest” in the action. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

3 Here, however, the movant with the largest financial stake in the Actions (by far) is Tawila,  
4 whose Yahoo holdings are more than 100 *times greater* than the Iron Workers’ Yahoo holdings.<sup>5</sup>  
5 *See, e.g., In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, slip op. at 37, 44 (E.D. La. Nov. 18,  
6 2005) (holding that “economic interest . . . should be given substantial weight” in selecting derivative  
7 lead plaintiff, and appointing individual investor applicant with largest shareholdings), a copy of  
8 which is attached as Exhibit B to the Herkenhoff Aug. 5 Decl.; *TCW Tech. Ltd. P’ship v. Intermedia*  
9 *Comm’s, Inc.*, No. 18336, 2000 WL 1654504, at \*4 (Del. Ch. Oct. 17, 2000) (stating that the factors  
10 that should guide a court “in determining which lawsuit should assume a lead or coordinating role”  
11 include giving “weight to the shareholder plaintiff that has the greatest economic stake in the  
12 outcome of the lawsuit”).<sup>6</sup> Thus, while Iron Workers claims its status as an institutional investor  
13 should balance in favor of its selection as Lead Plaintiff and its choice of counsel as Lead Counsel,  
14 in fact it is Tawila who is presumptively the most adequate Lead Plaintiff. Indeed, Iron Workers  
15 itself acknowledges this by citing *Wiehl v. Eon Labs*, No. Civ. A. 1116-N, 2005 WL 696764, at \*3  
16 (Del. Ch. Mar. 22, 2005) with approval, noting that the *Wiehl* case makes clear that “[c]ourts may  
17 consider the relative economic stakes of the plaintiffs in the litigation . . . .” *See* Iron Workers’  
18 Motion at 8 n.6.

19 The presumption of Tawila’s adequacy is further supported by his choice of counsel, the  
20 Weiser Firm, a highly experienced advocate for stockholders with significant, specialized experience  
21 successfully litigating complex (and sometimes, novel) derivative actions.<sup>7</sup> Thus, for the reasons set  
22

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23 <sup>5</sup> Based on the market value of Yahoo common stock as the date of this filing, Tawila’s  
24 holdings are currently worth approximately \$2.6 million. Iron Workers’ holdings, by contrast, are  
currently worth approximately \$30,000.

25 <sup>6</sup> Unless otherwise stated, all citations and internal citations are omitted.

26 <sup>7</sup> Notably, Iron Workers does not suggest that the Weiser Firm is ill-suited to serve as Lead  
27 Counsel in the Actions. Similarly, Tawila would stipulate that Iron Workers’ counsel has the  
experience required to properly litigate the Actions.

forth herein and in the Tawila Motion, the Court should appoint the Weiser Firm as Lead Counsel because of: (1) the high quality of its pleadings; (2) its representation of Tawila, the plaintiff with the greatest financial interest (by far); (3) the fact that it has prosecuted the Actions with energy, enthusiasm, and vigor; and (4) its competence and access to the resources necessary to successfully prosecute the Actions.

## II. STATEMENT OF FACTS

The Actions are shareholder derivative actions filed on behalf of Yahoo.<sup>8</sup> *See* Herkenhoff Decl., Exs. A-D. Despite Yahoo's global brand, its business has languished for the past several years, as the Company had largely failed to keep pace with Google and struggled to grow in highly regulated and politicized fast-growing markets like China. ¶33.

It has been alleged in the Actions that in order to overcome this situation, in 2005, certain of the Individual Defendants caused the Company to invest \$1 billion for a 40% interest in Alibaba Group Holding Limited ("Alibaba"), China's largest e-commerce company, which secured Yahoo one seat on Alibaba's four-person board of directors. ¶¶33-40. As a part of the new strategic partnership with Alibaba, under the Individual Defendants' direction, Yahoo also relinquished operation of Yahoo China to Alibaba. ¶34. In the Company's Form 10-Q for the quarterly period ended March 31, 2007, while discussing the Yahoo-Alibaba strategic partnership and touting the transaction as a great opportunity for Yahoo to expand its business in China, the Individual Defendants stated:

Through this transaction, the Company has combined its leading search capabilities with Alibaba's leading online marketplace and online payment system and Alibaba's strong local presence, expertise and vision in the China market. These factors contributed to a purchase price in excess of the Company's share of the fair value of Aliababa's net tangible and intangible assets acquired resulting in goodwill.

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<sup>8</sup> According to Yahoo's public filings with the Securities and Exchange Commission (the "SEC"), the Company operates as a digital media company that delivers personalized digital content and experiences across devices and worldwide. The Company's communications and communities offerings provide a range of communication and social services to users and small businesses across various devices and through its broadband Internet access partners. Its search and marketplace offerings provide answers to users' information needs by delivering meaningful search, local, and listings experiences on the search results page and across Yahoo. ¶2.

¶35.

As the remainder of the decade unfolded, Alibaba grew rapidly and the materiality of Yahoo's Alibaba interest had grown commensurately. By 2011, Yahoo's 40% stake in Alibaba was highly material to Yahoo, and in fact had become, according to many industry experts, Yahoo's most valuable corporate asset, *accounting for as much as two-thirds of Yahoo's entire \$21 billion market capitalization*. Yahoo's counterparts in China had been consulting with Yahoo for months on anticipated changes to Chinese regulations regarding foreign ownership. The Individual Defendants failed to address this issue and ultimately in 2010, Alibaba transferred ownership in Alipay to Alibaba's Chief Executive Officer ("CEO"), Jack Ma ("Ma"), for \$46 million -- a mere fraction of its true worth. Based on the materiality of Alibaba, it is reasonable to infer that the Individual Defendants were aware of the transaction at some point during 2010, but all of the Individual Defendants were undeniably aware of it by March 31, 2011, at the very latest. In an effort, however, to continue to maintain the perception publicly that Alibaba was a material part of Yahoo's business, the Individual Defendants concealed this material information. ¶¶36-40.

For example, on April 19, 2011, the Individual Defendants caused the Company to issue a press release announcing its first quarter 2011 financial results. The Individual Defendants reported earnings of \$223 million, or \$0.17 diluted earnings per share, and revenues of slightly more than \$1 billion. In the release, the Individual Defendants stated in part:

"We are solidly executing toward our plan for returning Yahoo! to sustainable revenue and profit growth," said Carol Bartz, CEO of Yahoo!. "During the quarter, we beat the midpoint of revenue guidance while continuing to deliver on the bottom line. We continued to extend our lead as the world's premier digital media company with users to Yahoo! branded properties increasing 15% year over year and minutes spent increasing 17%."

These were positive results and statements (with never a word about the Alipay fiasco), and the market naturally reacted favorably, with Yahoo's stock price increasing to \$16.87 per share.

¶42.

On May 10, 2011, Yahoo shareholders belatedly learned that the Company's \$1 billion investment in its strategic partnership with Alibaba likely had been severely impaired by the misappropriation of Alibaba's most valuable asset, Alipay, from Alibaba to another private company

1 controlled by Alibaba's CEO, Ma. On this news, Yahoo's stock price fell by 7%, to close at \$17.20  
2 per share. ¶43-44.

3 On May 12, 2011, the Individual Defendants caused the Company to issue a press release  
4 entitled "Yahoo! Inc. Releases Statement Regarding Alipay," which stated in part:

5 On March 31, 2011, Yahoo! and Softbank were notified by Alibaba Group of two  
6 transactions that occurred without the knowledge or approval of the Alibaba Group  
7 board of directors or shareholders. The first was the transfer of ownership of Alipay  
8 in August 2010. The second was the deconsolidation of Alipay effective in the first  
9 quarter of 2011.

10 Yahoo! disclosed this restructuring in its 10-Q after discussions with Alibaba Group  
11 and obtaining a better understanding of this complex situation.

12 Yahoo! continues to work closely with Alibaba and Softbank to protect economic  
13 value for all interested parties. We believe ongoing negotiations among all of the  
14 parties provide the best opportunity to achieve an outcome in the best interest of all  
15 stakeholders.

16 ¶45.

17 According to news reports, Alibaba received merely \$46 million for Alipay's assets, even  
18 though securities analysts valued those assets at **\$5 billion**. *Id.* Additionally, the Individual  
19 Defendants reportedly were aware of Ma's misappropriation of Alipay, failed to prevent the  
20 usurpation of Yahoo's valuable financial interests in Alipay, and then concealed the entire episode  
21 from Yahoo shareholders for six months. ¶46.

22 On May 15, 2011, the Individual Defendants caused the Company to issue a press release  
23 entitled "Joint Statement from Alibaba Group and Yahoo! Inc. Regarding Alipay," in which they  
24 stated in pertinent part:

25 "Alibaba Group, and its major stockholders Yahoo! Inc. and Softbank Corporation,  
26 are engaged in and committed to productive negotiations to resolve the outstanding  
27 issues related to Alipay in a manner that serves the interests of all shareholders as  
28 soon as possible."

¶47.

On this news, Yahoo's stock price collapsed by \$0.74 per share to close at \$15.81 per share  
on May 16, 2011 a decline of 15% from its Relevant Period high of \$18.65 per share. ¶48. As a  
result of the above detailed misconduct at Yahoo's expense and to its detriment, the Actions all



1 allege that the Individual Defendants breached their fiduciary duties. *See e.g.*, Herkenhoff Decl.,  
 2 Exs. A-D.

### 3 **III. ARGUMENT**

#### 4 **A. THE RELATED ACTIONS SHOULD BE CONSOLIDATED**

5 Consolidation of the related Actions is appropriate. Rule 42(a) of the Federal Rules of Civil  
 6 Procedure provides:

#### 7 Consolidation; Separate Trials

8 (a) Consolidation. If actions before the court involve a common question of law or  
 9 fact, the court may: (1) join for hearing or trial any or all matters at issue in the  
 10 actions; (2) consolidate the actions; or (3) issue any other orders to avoid  
 11 unnecessary cost or delay.

12 Fed. R. Civ. P. 42(a). “Thus, the main question for a court in deciding whether to consolidate is  
 13 whether there is a common question of law or fact.” *Indiana State District Council of Laborers and*  
 14 *Hod Carriers Pension Fund v. Gecht*, No. C-06-7274 EMC, 2007 WL 902554, at \*1 (N.D. Cal. Mar.  
 15 22, 2007). “A common question or questions do not have to predominate.” *Id.* “All that is required  
 16 is that the district court find they exist and that consolidation will prove beneficial.” *Id.* “The  
 17 district court, in exercising its broad discretion to order consolidation of actions presenting a  
 18 common issue of law or fact under Rule 42(a), weighs the saving of time and effort consolidation  
 19 would produce against any inconvenience, delay, or expense that it would cause.” *Huene v. United*  
 20 *States*, 743 F.2d 703, 704 (9th Cir. 1984).

21 The Actions all involve common questions of law and fact. *See Herkenhoff Decl.*, Exs. A-D.  
 22 The Actions each involve a core set of facts centering around the Individual Defendants’ misconduct  
 23 in failing to timely disclose that the Company’s highly material, valuable corporate asset in China –  
 24 Alipay – had been transferred for a mere \$46 million, substantially less than its estimated value of \$5  
 25 billion. Additionally, plaintiffs in each of the Actions allege that the Individual Defendants breached  
 26 their fiduciary duties to Yahoo and its shareholders. As a result, the Court should consolidate the  
 27 Actions.

**B. THE COURT SHOULD APPOINT TAWILA AS LEAD PLAINTIFF  
AND THE WEISER FIRM AS LEAD COUNSEL**

Courts consider various factors in appointing lead counsel in derivative litigation. Such factors include: (1) “the quality of the pleadings that appears best able to represent the interests of the shareholder class and derivative plaintiffs;” (2) “the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit;” and (3) “whether a particular litigant has prosecuted its lawsuit with greater energy, enthusiasm or vigor than have other similarly situated litigants.” *TCW Tech.*, 2000 WL 1654504 at \*4; *Bernhard v. TD Bank, N.A.*, Civ. No. 08-4392 (RBK/AMD), 2009 WL 3233541, at \*5 (D.N.J. Oct. 5, 2009) (outlining factors for consideration in selecting lead counsel as including “counsel’s knowledge of the applicable law”); *Millman ex rel Friedman’s Inc. v. Brinkley*, No. 1:03-CV-3831-WSD, 2004 WL 2284505, at \*3 (N.D. Ga. Oct. 1, 2004) (selection criteria includes “experience and prior success record [and] the number, size, and extent of involvement of represented litigants”); *OCA*, No. 05-2165, slip op. at 37, 44 (attached as Exhibit B to the Herkenhoff Aug. 5 Decl.) (holding that “economic interest ... should be given substantial weight” in selecting derivative lead plaintiff, and appointing individual investor applicant with largest shareholdings). Each of these factors favors the appointment of Tawila as Lead Plaintiff and the appointment of Tawila’s chosen counsel, the Weiser Firm, as Lead Counsel.

**1. The Quality of the Pleadings Submitted By the Weiser Firm  
Demonstrates That the Weiser Firm Is Best Suited to  
Represent the Interests of the Derivative Plaintiffs**

One factor courts consider in appointing lead counsel in derivative litigation is “the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs.” *TCW*, 2000 WL 1654504, at \*4. Here, it is apparent from the pleadings that, consistent with its reputation, the Weiser Firm has filed a high-caliber complaint on behalf of plaintiff Tawila. The Weiser Firm carefully researched, crafted, and filed the Tawila Action. By contrast, there are certain notable omissions in the complaint filed by Robbins Umeda on behalf of Iron Workers.

Most critically, Iron Workers failed to sue the entire Board. *See* Iron Workers’ Complaint. Tawila named the entire Board, including David Kenny (“Kenny”), one of Yahoo’s current directors, as defendants in his complaint. *See* Tawila Complaint, ¶23. Plaintiff Iron Workers, however,

1 inexplicably failed to name Kenny as a defendant. According to the Company's Annual Report on  
 2 Form 10-K filed with the SEC on February 28, 2011, defendant Kenny was appointed to the Board  
 3 effective April 1, 2011, and therefore Kenny was a director of Yahoo at the time of the April 19,  
 4 2011 statements by the Individual Defendants described above, which have been specifically  
 5 challenged in the Actions as materially false and misleading.<sup>9</sup> See [http://yahoo.brand.edgar-](http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=7760334-825-66859&type=sect&dcn=0001193125-11-050000)  
 6 [online.com/displayfilinginfo.aspx?FilingID=7760334-825-66859&type=sect&dcn=0001193125-11-](http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=7760334-825-66859&type=sect&dcn=0001193125-11-050000)  
 7 050000. Tawila submits that Iron Workers' failure to properly name all the members of the Board as  
 8 defendants, particularly where the omitted Board member was a director of the Company at the time  
 9 of the alleged false and misleading statements upon which the claims in the Actions are based,  
 10 demonstrates an obvious deficiency in the quality of Iron Workers' pleading.<sup>10</sup>

11 Because Tawila has filed a complaint that, in key respects, is superior quality to the pleadings  
 12 submitted by Iron Workers, this factor weighs in favor of the appointment of Tawila's chosen  
 13 counsel, the Weiser Firm, as Lead Counsel. *TCW*, 2000 WL 1654504, at \*4.

14 \_\_\_\_\_  
 15 <sup>9</sup> Iron Workers' omission of Kenny as a defendant is further magnified given fundamental  
 16 conflicts which raise doubt regarding his ability to impartially consider a demand. Specifically (as  
 17 alleged by plaintiff Oh), Kenny has close business and personal relationships outside of his  
 18 directorships at Yahoo with other current members of the Board, including defendants Arthur Kern  
 19 ("Kern") and Roy Bostock ("Bostock"). See Oh Complaint, ¶50. Delaware courts have specifically  
 20 held that there is reason to doubt a director's independence based on a long-term business  
 21 relationship with another director. See, e.g., *In re New Valley Corp. Derivative Litig.*, No. Civ. A.  
 22 17649, 2001 WL 50212, at \*8-\*9 (Del. Ch. Jan. 11, 2001) (finding that the existence of a long-term  
 23 business relationship among directors is enough to demonstrate reasonable doubt of a director's  
 24 independence at the pleading stage and that so long as a long-term business relationship is plead,  
 25 "[t]he Court will reserve judgment on the ultimate nature of these relationships until an adequate  
 26 record exists, after further discovery and factual development."); *Harbor Finance Partners v.*  
 27 *Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) ("Hudson's ties to Huizenga are such that it is  
 28 unreasonable to believe that Hudson could objectively consider the approval of ... a suit against  
 Huizenga ... This long-standing pattern of mutually advantageous business relations makes me  
 doubtful that Hudson could impartially consider a demand that Republic file a lawsuit adverse to  
 Huizenga's interests."). Because Yahoo is a Delaware corporation, Delaware substantive law will  
 apply to the demand futility analysis. See *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 108-09  
 (1991) ("a court that is entertaining a derivative action ... must apply the demand futility exception  
 as it is defined by the law of the State of incorporation").

<sup>10</sup> This omission is even more troubling given that Robbins Umeda made the exact same  
 omission in the duplicative derivative complaint they filed in May 2011 in the Superior Court for the  
 County of Santa Clara (the "Duplicative State Litigation"). The description of the Duplicative State  
 Litigation is set forth in the Iron Workers' Motion and is also addressed, *infra*.



2. **Tawila Has the Greatest Economic Stake in the Litigation Which Provides Him With Strong Motivation to Vigorously Prosecute the Actions**

In making determinations regarding lead counsel in derivative litigation, courts also “give weight to the shareholder plaintiff that has the greatest economic stake in the outcome of the lawsuit.” *TCW*, 2000 WL 1654504, at \*4; *see also OCA*, No. 05-2165, slip op. at 37, 44 (attached as Exhibit B to the Herkenhoff Aug. 5 Decl.); Tawila Declaration (setting forth Tawila’s holding of 220,000 Yahoo shares) (attached as Exhibit A to the Herkenhoff Aug. 5 Decl.). This factor “is similar to the federal system that now uses a model whereby the class member with the largest economic interest in the action is given responsibility to control the litigation.” *Id.* Here, Tawila is a long-term Yahoo shareholder who currently holds 220,000 shares. *See* Tawila Declaration.

Although the Iron Workers slyly acknowledge that “[c]ourts may also consider the relative economic stakes of the plaintiffs in the litigation” (Iron Workers’ Motion at 8 n.6), this issue is far more important than Iron Workers is apparently willing to admit; in fact, the size of shareholders’ respective holdings is the primary basis for the PSLRA’s lead plaintiff provisions,<sup>11</sup> the statute upon which the Iron Workers’ Motion relies. Iron Workers, however, owns only 2,585 shares of Yahoo stock, or **100 times less than Tawila**. *See* Declaration of Harvey Swift in Support of Motion to Consolidate Related Actions and Appoint Lead Counsel filed in support of the Iron Workers’ Motion, ¶3. Accordingly, Tawila is committed to vigorously prosecuting the Actions, and is highly motivated to produce the most beneficial resolution possible for the Company.

The Court, moreover, should appoint a Lead Plaintiff herein, and the best choice is Tawila. Despite Iron Workers’ contention that courts within the Ninth Circuit “routinely decline to appoint lead plaintiffs in shareholder derivative actions,” (Iron Workers’ Motion at 13 n.8), numerous courts

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<sup>11</sup> As noted above, the PSLRA in fact creates a presumption that the “most adequate plaintiff” is the movant with the “largest financial interest” in the action. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). *See also OCA*, No. 05-2165, slip op. at 37, 44 (attached as Exhibit B to the Herkenhoff Aug. 5 Decl.) (holding that “economic interest ... should be given substantial weight” in selecting derivative lead plaintiff, and appointing individual investor applicant with largest shareholdings).

1 within this district have, in fact, appointed lead plaintiffs in derivative actions. *See, e.g., Brown v.*  
 2 *Kelly*, No. C 06-04671 JW, 2006 WL 3411868, at \*1-\*2 (N.D. Cal. Nov. 27, 2006) (holding that the  
 3 appointment of lead plaintiffs is appropriate); *Berkowitz v. Fodor*, No. C 06-05353 JW, 2006 WL  
 4 3365587, at \*2 (N.D. Cal. Nov. 20, 2006) (appointing lead plaintiffs in a derivative action).<sup>12</sup>

5 Additionally, contrary to their assertions, the fact that the Iron Workers' Counsel are Co-  
 6 Lead Counsel in the Duplicative State Litigation only indicates that they are *not* appropriate to serve  
 7 as Lead Counsel here. *See, e.g., Davis v. Comed, Inc.*, 619 F.2d 588, 597 (6th Cir. 1980) (finding  
 8 derivative plaintiff inadequate because, *inter alia*, he had already brought additional, separate  
 9 litigation against defendants, and noting that "[t]his derivative action appears to be just one more  
 10 skirmish in a larger war between Davis and some of the defendants . . ."). It is also apparent that  
 11 the motivating factor for multiplying the litigation was simply concern over protecting potential fees.

12 Finally, Iron Workers cite only one case to suggest that there is no *per se* conflict in dual  
 13 representations of shareholder derivative plaintiffs in state and federal court, *Sparano v. Lief*, No.  
 14 10cv2079 BTM (BLM), 2011 WL 830109, at \*1 (S.D. Cal. Mar. 3, 2011). However, the *Sparano*  
 15 opinion fails to consider the realities of the litigation of these cases. The issue of demand futility  
 16 will only be decided in one case. *See, e.g., In re Sonus Networks, Inc.*, 499 F.3d 47 (1st Cir. 2007)  
 17 (dismissal in one forum on demand futility has issue-preclusive effect in second forum). Indeed, a  
 18 review of the docket in the *Sparano* action shows that after securing a lead counsel position over  
 19 both federal and state cases, Robbins Umeda then voluntarily stayed both cases. *See* Herkenhoff  
 20 Aug. 5 Decl. at Ex. C. While the reason cited for the requested stay was settlement negotiations, this

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 23 <sup>12</sup> There is no specific statutory framework for the appointment of a Lead Plaintiff in  
 24 shareholder derivative actions. However, as the U.S. Supreme Court recognized in *Cohen v.*  
 25 *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949), a plaintiff who leads a shareholder  
 26 derivative suit occupies a position "of a fiduciary character," in which "[t]he interests of all in the  
 27 redress of the wrongs are taken into his hands ..." This comports with the logic of the PSLRA,  
 28 which is based on the presumption that the most adequate plaintiff to lead is the one with the largest  
 financial interest in the action – after all, that plaintiff is the best-motivated to seek redress of the  
 wrongs at issue. Accordingly, plaintiff Tawila should be appointed Lead Plaintiff. However, even if  
 the Court declines to appoint a Lead Plaintiff, Tawila respectfully requests that his chosen counsel,  
 the Weiser Firm, should be appointed as Lead Counsel.

1 Court will no doubt realize that both *Sparano* state and federal actions would not have proceeded  
 2 simultaneously. Thus, assuming that the Iron Workers' Counsel did not file in this Court just to turn  
 3 around and ask this Court to indefinitely stay its docket in favor of state court, the Duplicative State  
 4 Litigation should be stayed and, accordingly, the only issue for this Court at present is which counsel  
 5 has demonstrated the most effective litigation efforts on behalf of Yahoo, has superior pleadings, and  
 6 has a client with the most-vested interest in pursuing Yahoo's claims.<sup>13</sup> As set forth above, Tawila  
 7 respectfully submits that there is only one conclusion – Tawila and the Weiser Firm.

### 8                   **3. Plaintiff Tawila Has Prosecuted the Actions with Greater** 9                   **Energy, Enthusiasm, and Vigor**

10           Another factor that courts consider in appointing lead counsel in derivative litigation is  
 11 “whether a particular litigant has prosecuted its lawsuit with greater energy, enthusiasm or vigor than  
 12 have other similarly situated litigants.” *TCW*, 2000 WL 1654504, at \*4. In addition to being  
 13 supported by plaintiff Tawila who has a greater economic stake in the Actions, and submitting  
 14 pleadings of the highest quality, the Weiser Firm has clearly demonstrated its leadership and  
 15 commitment to prosecuting the Actions diligently and vigorously. Plaintiff Tawila not only filed his  
 16 complaint in the Northern District of California before Plaintiff Iron Workers, but he was also the  
 17 first plaintiff to seek consolidation of the Actions by formal motion filed on July 11, 2011, thereby  
 18 demonstrating his greater energy and enthusiasm to vigorously prosecute the Actions. Accordingly,  
 19 it is Tawila who has acted most expeditiously to attempt to organize the Actions. Consequently, this  
 20 factor strongly favors the appointment of the Weiser Firm as Lead Counsel.

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 25 <sup>13</sup> Indeed, even assuming for sake of argument that there is no *per se* conflict in the dual  
 26 representation of state and federal derivative plaintiffs, one can well imagine the myriad issues that  
 27 can arise if the clients in the Duplicative State Litigation do not want to have their actions stayed, or  
 28 disagree with Iron Workers on the direction of litigation of the Actions.

1                   **4.     The Weiser Firm Has a Documented History of Successful**  
2                   **Prosecution of Complex Derivative Actions and Has the**  
3                   **Resources Necessary to Aggressively and Judiciously Prosecute**  
4                   **the Actions**

5                   An additional factor that courts consider in appointing lead counsel in derivative litigation is  
6                   the “competence of counsel and their access to the resources necessary to prosecute the claims at  
7                   issue.” *Hirt v. U.S. Timberlands Service Co.*, No. CIV. A. 19575, 2002 WL 1558342, at \*2 (Del.  
8                   Ch. July 9, 2002). As fully described in the Tawila Motion and documented in the firm resume of  
9                   the Weiser Firm, the Weiser Firm has extensive experience in derivative and complex securities  
10                  litigation and is well-equipped to prosecute the Actions. *See* Tawila Motion; Herkenhoff Decl., Ex.  
11                  E. Indeed, Robert Weiser, the founder of the Weiser Firm, has been involved in some of the most  
12                  successful shareholder derivative actions in history. *See* Herkenhoff Decl., Ex. E. Thus, the Court  
13                  should appoint the Weiser Firm as Lead Counsel given its demonstrated focus on shareholder  
14                  derivative litigation and its history of success in such prosecutions.

15                  **IV.     CONCLUSION**

16                  For the foregoing reasons, the Court should deny the Iron Workers’ Motion and should grant  
17                  the Tawila Motion to consolidate the related Actions, appoint Plaintiff Tawila as Lead Plaintiff, and  
18                  appoint the Weiser Firm as Lead Counsel.

19                  DATED: August 5, 2011

20                  Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I also caused to be mailed the foregoing document or paper via the United States Postal Service to the persons indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following Designated Internet Site at: <http://securities.stanford.edu>.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 5, 2011.

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